

**International Union of Operating Engineers, AFL-CIO, Local 542 and Stauffer Chemical Company and Jacobi Contractors, Inc. Case 4-CD-508**

April 6, 1981

**DECISION AND DETERMINATION OF DISPUTE**

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Stauffer Chemical Company, herein called the Employer, alleging that International Union of Operating Engineers, AFL-CIO, Local 542, herein called Local 542, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees it represented rather than to employees of Jacobi Contractors, Inc., hereinafter called Jacobi.

Pursuant to notice, a hearing was held before Hearing Officer Wendella P. Fox on October 7, 1980. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. A brief has been filed by the Employer.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

**I. THE BUSINESS OF THE EMPLOYER**

The parties stipulated, and we find, that the Employer, a Delaware corporation, is engaged in the manufacture of chemical products at its Delaware City, Delaware, facility. During the past year, the Employer purchased products valued in excess of \$50,000 directly from points located outside the State of Delaware. During the same period, the Employer sold products valued in excess of \$50,000 directly to points located outside the State of Delaware. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

**II. THE LABOR ORGANIZATIONS INVOLVED**

The parties stipulated, and we find, that International Union of Operating Engineers, AFL-CIO, Local 542, is a labor organization within the meaning of Section 2(5) of the Act.

**III. THE DISPUTE**

**A. Background and Facts of the Dispute**

Stauffer Chemical Company manufactures polyvinyl chloride at its Delaware City, Delaware, facility. Stauffer regularly employs both union and nonunion contractors. In order to accommodate both union and nonunion workers, Stauffer has maintained two separate entrances at its facility.

In June 1980,<sup>1</sup> the Employer contracted with Jacobi Contractors, Inc., a nonunion contractor, to dig a trench for a high pressure water line. Jacobi had done work for Stauffer on a contract basis for the past 2 years. Jacobi commenced work on August 11. Charles S. Webb, Jacobi's heavy equipment operator, testified that on August 11 two members of Local 542 approached him at the jobsite and asked him if he was a member of Local 542. Webb responded that he was not and the two union members told him he should stop working. On August 12, Albert Spanich, the business representative of Local 542, approached Webb at the jobsite and asked Webb if he was a member of Local 542. Webb responded that he was not and Spanich left. Spanich had no other conversations, either with representatives of Jacobi or Stauffer at this time.

On August 13 and 14, pickets appeared at the union and nonunion entrances of the Employer's plant. There were five or six individuals standing at the union contractor's entrance and several cars parked on either side of the entrance on both days. No one carried signs. At the nonunion contractor's entrance there were approximately 20-30 individuals blocking the entrance and cars were parked beside the entrance on both days.<sup>2</sup> Approximately 6 to 10 individuals were carrying signs which stated "FOR INFORMATIONAL PURPOSES ONLY JACOBI CONST. CO. DOING WORK UNDER SUBSTANDARD WAGES AND CONDITIONS THEREBY LOWERING STANDARDS IN THE COMMUNITY OPERATING ENGINEERS LOCAL 542." Neither union nor nonunion employees reported to work on August 13 and 14.

Thomas Allen, Stauffer's plant engineer, testified that because Stauffer was presently engaged in work of a critical nature Stauffer's attorney advised him to terminate Jacobi's contract. On August 14 at approximately 8:45 a.m., Allen informed Jacobi that Stauffer was terminating its contract. Subsequently, at approximately 9:45 a.m., Allen and his

<sup>1</sup> All dates hereinafter are in 1980 unless otherwise stated.

<sup>2</sup> On August 14, several welded spikes were found in front of the non-union entrance.

immediate supervisor went to the nonunion contractor's entrance and asked one of the picketers to have their business agent call him. Fifteen minutes later Spanich called Allen. Allen told Spanich that Jacobi had been terminated and asked "if that would be enough to terminate this job action (picketing)." Spanich responded that it would. At approximately 12 noon Allen returned from lunch and the picketing had ceased. A week later, Corrado Brothers, a union contractor who employs members of Local 542, completed the digging of the trench.

### B. *The Work in Dispute*

The work in dispute involves the excavation of a trench for the installation of a high pressure line between the reactor building and the service building at the Stauffer Chemical Company PVC plant, Delaware City, Delaware. More specifically, the disputed work involves the digging of a trench for a high pressure water line 333 feet long, 1 foot wide, and 4 feet deep.

### C. *The Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that Local 542 has violated Section 8(b)(4)(D) because the picketing was directed at Jacobi Contractors, Inc., a nonunion contractor whose employees do the same work as employees represented by Local 542, and the picketing ceased after Jacobi's contract was terminated and Jacobi was replaced by Corrado Brothers, a contractor who employs employees represented by Local 542.

Local 542 contends there is no evidence indicating that it violated Section 8(b)(4)(D) because at no time did it, nor does it now, claim the disputed work; its picketing was solely for the purpose of informing the public that Jacobi paid substandard wages, and it made no threats concerning the assignment of the disputed work.<sup>3</sup>

### D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

As noted above, Local 542 contends that it was engaged in informational picketing for the sole purpose of calling attention to the substandard wages paid by Jacobi Contractors, Inc. We find no merit in Local 542's contention. Spanich testified that the

only attempt made to determine Jacobi's wage and benefit standards was in a telephone conversation he had with Jacobi "possibly two years ago, a year and a half to two years ago." Spanich also testified that in August 1980 he did not know the rate of pay that Jacobi was paying his employees. Thus, it is clear that Local 542 had no information on which it could conclude that Jacobi's wages did not meet area standards. Nor was any attempt made to investigate or otherwise determine Jacobi's wage rates. Further, we note that, when the Employer informed Local 542 that it had terminated its contract with Jacobi, Local 542 immediately ceased picketing the Employer's premises, and employees represented by Local 542 were subsequently hired to complete the disputed work. In our view, these facts established reasonable cause to believe that an object of Respondent's picketing was to force removal of Jacobi Contractors, Inc., and to force reassignment of that work to members of Local 542, and that therefore a jurisdictional dispute exists which is cognizable under Section 8(b)(4)(D) of the Act.<sup>4</sup>

There is no contention and no evidence that there is an agreed-upon method for the voluntary resolution of the dispute. Accordingly, we find the dispute is properly before the Board for determination under Section 10(k).

### E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.<sup>5</sup> The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.<sup>6</sup>

The following factors are relevant in making the determination of the dispute before us:

#### 1. *Employer's past and present practice*

The record shows that the Employer regularly employs union and nonunion contractors. The Employer awards its construction contracts based upon, *inter alia*, the size of the job, duration of the job, and the experience and equipment availability of the respective construction companies. Jacobi Contractors, Inc., has done construction work for the Employer and others on a contract basis for

<sup>4</sup> See *Local No. 1823, International Brotherhood of Electrical Workers, AFL-CIO*, 218 NLRB 17 (1975).

<sup>5</sup> *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO* [Columbia Broadcasting System], 364 U.S. 573 (1961).

<sup>6</sup> *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

<sup>3</sup> Local 542 has not filed a brief but raised these contentions during the hearing.

the past 2 years. The Employer chose Jacobi over other contractors because, *inter alia*, of the job's short duration, its low dollar volume, and because the job could be handled by a few employees. The Employer uses large contractors to handle large jobs, whereas Jacobi is used to handle small jobs of short duration. Consequently, it appears from the foregoing that the Employer's past and present practice favors assigning the disputed work to employees of Jacobi Contractors, Inc.

## 2. Employer preference

As noted above, the Employer considers the following criteria when determining which contractor will be awarded a particular job: (1) the job's magnitude; (2) hourly charge for equipment; (3) competency; (4) experience; and (5) equipment and personnel availability. In the instant case, the Employer considered the aforementioned criteria and chose Jacobi over employees represented by Local 542. There is no claim or evidence offered by Local 542 that employees it represents could perform the same task more economically or efficiently. The Employer assigned the work in dispute to, and prefers that it be performed by, the employees of Jacobi Contractors, Inc. This favors an award to these employees.

## Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved,<sup>7</sup> we con-

<sup>7</sup> Other factors usually taken into account, such as collective-bargaining agreements and Board certifications, industry practice, skill, and arbitration awards either are not pertinent or are equipoised. The Employer has no contract with Local 542 and Jacobi's employees are unrepresented. No evidence was adduced concerning industry practice, or arbitration awards. Finally, both competing groups of employees have the requisite skill to perform the disputed work.

Inc., are entitled to perform the work in dispute. We reach this conclusion on the basis of the Employer's past and present practice, the relative economy and efficiency of operations, and the Employer's preference. We shall, therefore, determine the dispute before us by awarding the work in question to employees of Jacobi Contractors, Inc. The present determination is limited to the particular controversy which gave rise to this proceeding.

## DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Jacobi Contractors, Inc., are entitled to perform the excavation of a trench for the installation of a high pressure line between the reactor building and the service building at the Employer's Delaware City, Delaware, facility.

2. International Union of Operating Engineers, AFL-CIO, Local 542, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Stauffer Chemical Company to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local 542 shall notify the Regional Director for Region 4, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.